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No. 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

v.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, deceased; H. E. FRANTZ, Executor of the Estate of William R. Gilpin, deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, deceased; BEN WILLIAMSON, JR., and DAVIS GEIGER, Co-Executors of the Estate of Ben Williamson, deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, deceased; HENRY SANDIFER, Executor of the Estate of Alexander B. Massey, deceased,

Respondents.

BRIEF FOR PETITIONER

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Respondents.

BRIEF FOR PETITIONER

OPINIONS BELOW

The District Judge for the Eastern District of Kentucky filed no opinion. He relied upon his former opinion in *Anderson* v. *Brady, et al.* (1941), 1 F. R. D. 589. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the District Court (R. 26) and the dissenting opinion of Judge Simons (R. 31) are reported in 153 F. (2d) 685. The order of affirmance was entered January 28, 1946 (R. 26). This Court granted certiorari and ordered the case transferred to the summary docket by order entered May 13, 1946 (14 U. S. Law Week 3405).

CONCISE STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court to review this cause by Writ of Certiorari by Section 40(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, § 347). As noted above, this Court granted certiorari May 13, 1946.

STATEMENT OF THE CASE

This case presents an important question of federal law and practice which has not been, but should be, settled by this Court.[1] It involves the interpretation and reconciliation of Rule 25(a)[2] and Rule 6(b)[3] of the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court pursuant to the Act of June 19, 1934, Chapter 651.

No question of fact is involved (R. 28). The entire record is covered by short stipulations.

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[1] Sec. 5(b) of Rule 38 of the Revised Rules of the Supreme Court of the United States.

[2] Rule 25. Substitution of Parties. (a) Death. (1) If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. (2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

[3] Rule 6. Time. . . . (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

This case involves the estates of seven individuals who were among the defendants in an action brought to collect a stock assessment. These defendants died while the suit was pending. The sole issue in each case is whether the district court has power to revive an action against a deceased defendant after the two year period provided in Rule 25(a), upon motion of petitioner filed under Rule 6(b) and a showing of affirmative and satisfactory proof that failure to revive within two years was due to "excusable neglect." The court below held that the two year period prescribed in Rule 25(a) was mandatory and that the district court was without any discretion to act after the expiration of the period notwithstanding the specific provisions of Rule 6(b) providing that "when by these rules . . . an act is *required* or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . (2) upon motion permit the act to be done *after the expiration of the specified period* when the failure to act was the result of excusable neglect. . . ." (Emphasis supplied.)

In other words, the question is whether Rule 6(b) means exactly what it says. Under Rule 25(a), if a party dies, it is provided that upon motion the court may order substitution of the proper parties "within two years after the death." Rule 6(b) permits an act to be done after the expiration of the specified period for cause shown when the failure to act was the result of excusable neglect. By its language ("When by these rules . . .") Rule 6(b) appears to apply to *all* rules with but two specific exceptions which are not applicable here. The effect of the holding of the courts below was to incorporate in Rule 6(b) a third exception to the discretionary powers of the district court to act under the broad powers of this rule.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in holding that the District Court had no discretion to extend the time for revivor, notwithstanding proof of "good cause" and "excusable neglect" under Rule 6(b).

ARGUMENT

The cases at bar all stem from the bill of complaint filed by the petitioner on February 16, 1936, in the Eastern District of Kentucky to recover stock assessments from shareholders of the BancoKentucky Company (R. 1). The allegations of the petition were identical to the allegations filed in the case of *Anderson* v. *Abbott, et al.*, in the Western District of Kentucky and in the petition filed in other districts throughout the United States (R. 1). *Anderson* v. *Abbott* was the principal case upon which all of the others depended, and during the course of time which it took to bring that case up for final decision of this Court, the cases at bar in the Eastern District of Kentucky and other districts in the United States were stayed by agreement with the understanding that they would be governed by the decision in this Court of the *Abbott* case.

This Court decided *Anderson* v. *Abbott, et al.*, March 6, 1944 and sustained the liability of the shareholders of BancoKentucky for the stock assessment (321 U. S. 349), and denied a rehearing on April 3, 1944 (321 U. S. 804).

During the time that *Anderson* v. *Abbott* was being litigated, the BancoKentucky shareholders involved in these actions died and the respondents were appointed to administer their estates (R. 5, 7, 10, 12, 14, 15, 18). The petitioner, through no lack of diligence, did not learn of the death of these shareholders until more than two years after the deaths had occurred (R. 5, 7, 10, 12, 14, 15, 18). Promptly upon learning of the death of these shareholders petitioner moved to revive the cases against the representa-

tives of the decedents (R. 5, 7, 9, 11, 13, 15, 17). The motions for substitutions of the representatives of the decedents were supported by adequate proof under Rule 6(b) to warrant the granting of the substitution if the district court had power to exercise discretion (See Stipulations, R. 5, 7, 9, 11, 13, 15, 17). However, in each case the District Judge held that he was barred by Rule 25(a) from exercising any discretionary powers, denied the motions for revivor, and dismissed the bill of complaint.

The record contains a stipulation for each of the seven cases at bar (R. 5, 7, 9, 11, 13, 15, 17). As to the decedents, William R. Gilpin (R. 7), Alexander B. Massey (R. 10), Ben Williamson (R. 12), James H. Kitchen (R. 13), and William K. Massie (R. 18), it is stipulated that the estates are still open and undistributed. As to the decedent, Albert Yungkau, it is stipulated that he died July 19, 1941, "his will was probated July 28, 1941, and his estate was immediately delivered to the beneficiaries of his will" (R. 5).

In all seven cases it is stipulated that the petitioner, A. M. Anderson, Receiver of the National Bank of Kentucky, did not know of the death until more than two years had expired (R. 5, 7, 10, 12, 14, 15, 18).

In each case the record contains the stipulation that Anderson, as Receiver, brought actions against approximately 5000 defendants and that there were, all told, approximately 6000 shareholders of the National Bank of Kentucky and "these shareholders lived in all parts of the United States and some of them in foreign countries, and during the years that the actions have been in progress many of them have changed their residence from one place to another" (R. 5, 7-8, 10, 12, 14, 15-16, 18). It was further stipulated in each case that Mr. Anderson has had a limited staff at his disposal and "it has been impracticable and, *in fact, impossible* to learn of the movements and residences and even the death of defendants . . ." (R. 5, 8, 10, 12, 14,

15, 18, emphasis supplied). It was agreed that without such knowledge Anderson "could not bring actions for revivor until after he learned of the death" (R. 6, 8, 10, 12, 14, 16, 18). It was further agreed that Anderson "has been diligent in the performance of his duty" (R. 6, 8, 10, 12, 14, 16, 18).

No argument needs to be added in support of the stipulations that the Receiver at all times has been diligent in the performance of his duty. With over 6000 stockholders of BancoKentucky and actions brought against approximately 5000 of them, it was, as is specifically stipulated, in fact impossible to learn of the movements and residences and even the death of defendants. Even if the war had not resulted in abnormal movements and changes of residences, the task of keeping track of the approximately 5000 defendants would have been beyond the capacity of the limited facilities of the receivership. The incidence of the war made it impossible to follow the movements and deaths of the shareholders of BancoKentucky scattered throughout the United States and foreign countries.

Even with this clear and stipulated showing of a reasonable excuse for failure to apply for substitution within two years after the death of decedents, the District Judge held that he was powerless to permit substitution after the expiration of the two year period. In so holding, he relied upon his decision in *Anderson* v. *Brady, et al.* (1941), 1 F. R. D. 589, in which he ruled that Rule 6(b) did not apply when the two year period provided in Rule 25(a) had expired. A similar ruling was made in *Winkleman et al.* v. *General Motors Corporation, et al.* (1939), 30 F. Supp. 112, cited below, but there the District Judge found that the death was known to the opposing party within the two year period, so that "excusable neglect," within the meaning of Rule 6(b) was not shown to exist. In the cases at bar, however, the District Judge held in effect that not-

withstanding the fact that "excusable neglect" was shown, that substitution was not permitted after the two year period prescribed by Rule 25(a).

In its "Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States" the notes of the Advisory Committee to Rules 6 and 25 contain such a thorough analysis of the decisions of the courts under these rules that anything we might add would be cumulative (Report pp. 2-6, 32). However, in passing, we think it pertinent that the Advisory Committee noted that Rule 6(b) could be interpreted to be of general application to all rules and court orders other than the specific exceptions contained in the rule itself, the Committee's note to subdivision 6(b) stating in part:

> "Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6(b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b)."

> "Decisions of lower federal courts suggest that some of the rules containing time limits which may be set aside under Rule 6(b) are Rules 25, 50(b), 52(b), 60(b) and 73(g)."

> "In a number of cases the effect of Rule 6(b) on the time limitations of these rules has been considered. *Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion*

> *to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6(b),* and in some cases the rule has been so construed." (Report of Proposed Amendments, pages 2-3, emphasis supplied).

Although there are several decisions referred to in the notes of the Advisory Committee to Rule 6(b), all of them are decisions of the lower courts except this Court's ruling in *Leishman* v. *Associated Wholesale Electric Co.* (1943), 318 U. S. 203, which recognized that "... Rule 6(b) allowed the district court to enlarge the time to make a motion for amending findings and judgment beyond the limit expressly fixed in Rule 52(b)" (Report of the Advisory Committee, supra, p. 3). That case also recognized that Rule 6(b) meant exactly what it said when it specifically excepted the enlargement of the time for motions for or granting new trial (318 U. S. 203, 206).

There was nothing in the presentation of Rule 6(b) to the bar or to the Congress to indicate that there were any exceptions to Rule 6(b) other than the two specific exceptions set forth in the rule. In an address given during the proceedings of the American Bar Association Institute at Cleveland in 1938, Dean Charles E. Clark, a member and reporter of the Advisory Committee said:

> "We have divided the rule (6[b]) into two parts, and there is rather an important difference between the two. The first is when the application is made before the time limit has already arrived, before the given time limit has expired, and there it is provided that the court may at any time, with or without motion or notice, order the period enlarged."
>
> "The second provision is one covering a case where the time has already gone by, and here it is restricted to be done only on motion, but the court may still per-

mit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect, *with two exceptions*. The two exceptions are Rule 59, which deals with motions for new trial, and the period for taking an appeal, which of course, is governed by statutory law" (See Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute at Cleveland in 1938, p. 210, emphasis supplied).

Likewise when the rules were discussed before the Committee of the Judiciary of the House of Representatives prior to the time that they were to become effective, Edgar B. Tolman, a member of the Advisory Committee, after reading Rule 6(b) to the Committee, said:

"There are many cases that have gone wrong because the time prescribed for an appearance or for filing a pleading or a motion has expired. The apprehension that every lawyer entertains of getting caught without knowledge of a rule or service of summons or notices is here removed because the court, in its discretion, even after the time has gone by, may do this, thus preventing many miscarriages of justice" (Hearings before the Committee on the Judiciary, House of Representatives, 75th Congress, Third Session, p. 90).

It would appear from this that if Congress or the Advisory Committee contemplated that there were exceptions to Rule 6(b), other than the two incorporated in the rule itself, there is no indication of it.

Nevertheless, the District Judge and two of the judges of the Court of Appeals felt that the language of Rule 25 (a): "If substitution is not so made, the action *shall* be dismissed as to the deceased party" (emphasis supplied) was a mandatory restriction which precluded the court's exercise of discretion under Rule 6(b), and, in effect, en-

grafted an additional exception to Rule 6(b). Judge Simons of the Court of Appeals, however, felt that although Rule 25(a) "speaks in terms that are seemingly mandatory," Rule 6(b) "permits the Court to enlarge the period after the expiration of two years 'where the failure to act was the result of excusable neglect' " (R. 21). Noting that the opinion of the majority of the Court ". . . considers it to be conceded that the neglect to reinstate the proceedings was excusable," Judge Simons thought that the statement of the specific exceptions to Rule 6(b) indicated that the use of the word "shall" in Rule 25(a) was not a mandatory restriction (153 F. [2d] 685, 688; R. 31).

We think that the reasoning of Judge Simons is sound. As this Court has indicated on a number of occasions, the use of the word "shall" is not always absolute and imperative. See *Escoe* v. *Zerbst*, Warden (1935), 295 U. S. 490; *Railway Company* v. *Hecht* (1877), 95 U. S. 168; *West Wisconsin Railway Co.* v. *Foley* (1876), 94 U. S. 100; *Richbourg Motor Co.* v. *United States* (1930), 281 U. S. 528, 534.

The language of rules other than Rule 25(a) appear to be mandatory, but it has been held that such language is not to be so construed when considered in connection with the discretionary power granted by Rule 6(b). Thus, Rule 12(a) provides that "a defendant *shall* serve his answer within thirty days . . . ," but it has been held that the time may be enlarged under Rule 6(b). *Blanton* v. *Pacific Mutual Life Insurance Co.* (1944), 4 F. R. D. 200. See also *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3, 1939), 104 F. (2d) 83.

Various acts required to be done by the rules within specified periods apparently carry mandatory consequences if not done on time. However, such mandatory language cannot be read without reference to the rules as a whole. When so read it is clear that Rule 6(b) was intended to relieve against the injustice and the hardship of an un-

yielding application of the executioner's knife when compliance with the time limit was "impossible" and "cause" and "excusable neglect" are established.

This interpretation is in accordance with the intent of the new rules to liberalize procedure, mitigate the harshness of the old rules and to prevent a miscarriage of justice, as Major Tolman so clearly stated when he was discussing this rule before the Judiciary Committee of the House of Representatives of the 75th Congress. The interpretation of the District Court would prevent revivor after two years under any circumstances, including cases where the fact of death was concealed from the opposite party until the period provided by Rule 25(a) had expired.[4]

Certainly the cases at bar demonstrate the wisdom and need for a broad application of Rule 6(b). With approximately 6000 shareholders of BancoKentucky scattered throughout the United States and foreign countries and approximately 5000 defendants in courts throughout the country awaiting the decision in the *Abbott* case, it was in fact and was so stipulated, impossible to learn of the changes of residences and the deaths of all of the shareholders. This is particularly so where, as here, after the actions had been filed *and service obtained* (R. 2) and before the final decision in the *Abbott* case, the country was plunged into a war which resulted in abnormal movements of a large sector of the population and frequently deaths could not be known and were not reported until after the two year period had expired.

Thus, wholly aside from the proposed amendments to Rules 6(b) and 25(a), the rules as they now stand do not indicate an intention to limit the discretionary powers of the district courts to act in the interest of justice where a period provided by one of the rules (other than the two specific exceptions) has expired. To interpret the rules

[4] Cf. *Holmberg et al.* v. *Armbrecht* (1945), 327 U. S. 392, where the fact of stock ownership was concealed.

otherwise would prevent the court from ordering substitution in any case in which the death of a party was wilfully concealed by the representatives. The situation in these cases presents as clear proof of good cause for the court to exercise the discretionary powers provided by Rule 6(b) as a case of deliberate concealment.

The effect of the proposed amendments to Rules 6(b) and 25(a) is specifically to carry over into Rule 25(a) the discretion to act after the expiration of the two year period upon a showing of a reasonable excuse for failure to apply within that period which is provided generally by the present Rule 6(b), and to resolve the ambiguity that was imported into the rule by the decision of the lower courts in this case. The Advisory Committee recognized the need for the exercise of discretion in its note to the amendment proposed for Rule 25, where it said:

> "This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the two year period."

If this Court should affirm the decision in this case and later adopt the proposed clarifying amendments to the rules, the effect will be to deny to the Receiver the right to obtain substitution under circumstances in which substitution will not in the future be denied to other litigants.

CONCLUSION

It is respectfully submitted that the decision of the court below should be reversed.

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